Carbonex Coal Company *and* United Mine Workers of America and International Union of Operating Engineers, Local 627, AFL-CIO, Party to the Contract. Case 16-CA-8500

July 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 30, 1981, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, a supporting brief, and a supplemental statement in support of its exceptions; the Charging Party filed exceptions, a supporting brief, its brief to the Administrative Law Judge as a brief in support of the Administrative Law Judge's Decision, a reply brief to Respondent's exceptions, and a supplemental brief in support of the Administrative Law Judge's Decision; the Party to the Contract filed exceptions and a supporting brief; and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.

1. Subsequent to the filing of briefs, Respondent and the Charging Party filed various motions and statements regarding remarks made by each other in their briefs. The motions are denied. The Board is capable of evaluating such remarks.

2. The Charging Party requests the Board, as an additional remedy, to order Respondent to repay Charging Party for all litigation expenses, to mail the notice to employees to present and former employees of the Roger Mine, to read the notice to assembled employees of the Roger Mine, and to publish the notice in a local newspaper. The request is denied. An award of litigation expenses is appropriate only when a respondent raises patently frivolous defenses. *Neely's Car Clinic*, 242 NLRB 335 (1979), citing *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). Although we find Respondent's defenses here to be without merit, we are unable to conclude that they constitute patently frivolous defenses. Special notice remedies, such as those requested, are designed to meet special situations not present in this proceeding. Here, the regular notice-posting requirement recommended by the Administrative Law Judge is sufficient to inform employees of their rights.

3. We agree with the recommended Order of the Administrative Law Judge in its entirety, including the requirements that Respondent withdraw and withhold all recognition from the International Union of Operating Engineers, Local 627, AFL-CIO, herein called Operating Engineers, as bargaining representative of employees at the Defiance Mine and that Respondent recognize and bargain with the United Mine Workers of America, herein called Mine Workers, as the exclusive bargaining representative of employees at the Defiance Mine. See *Fraser & Johnston Company*, 189 NLRB 142 (1972). The recommended Order, which we are adopting, is appropriate and necessary to remedy Respondent's unfair labor practices because (1) Respondent has committed serious and extensive unfair labor practices, (2) a majority of Roger Mine employees would in all likelihood have transferred to the Defiance Mine had Respondent not violated the Act, (3) the remedy reasonably restores the approximate *status quo ante*, and (4) any lesser remedy would be ineffectual.

Respondent has committed pervasive violations of the National Labor Relations Act, all directed toward depriving the Mine Workers of its right to represent employees at the Roger Mine, including unlawfully refusing to notify and bargain with the Mine Workers about the transfer of unit work from the Roger Mine to the Defiance Mine; discriminatorily accelerating the opening of the Defiance Mine; and discriminatorily transferring employees represented by, and hiring employees through the hiring hall of, the Operating Engineers to work at the Defiance Mine without recalling unit employees. In addition, Respondent prematurely recognized the Operating Engineers as bargaining representative at the Defiance Mine; unlawfully extended its bargaining agreement with the Operating Engineers to the Defiance Mine and entered into a successor bargaining agreement with the Operating Engineers both containing union-security, checkoff, and hiring hall provisions; and unlawfully required employee applicants for the Defiance Mine to use the Operating Engineers hiring hall. These multiple

[1] Respondent and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

The Administrative Law Judge's Decision incorrectly lists the date Kenny Shipley was offered a job as 5-10-79; the correct date as shown in the record is 4-10-79.

violations of Section 8(a)(1), (2), (3), and (5) of the Act warrant the extensive remedy herein.[2]

Although the mine workers were on strike (an unfair labor practice strike) at the Roger Mine, there were, when the Defiance Mine was opened, a sufficient number of Roger Mine employees who had been laid off or who had applied for reinstatement to constitute a majority of the ultimate employee complement at the Defiance Mine. As the Defiance Mine is only 5 miles or less from the Roger Mine and as equipment and managerial personnel were transferred from the Roger Mine to the Defiance Mine, employees from the Roger Mine, in the normal course of business, would be expected to be transferred to the Defiance Mine. However, Respondent's unfair labor practices prevented, obstructed, and effectively prohibited such transfers of employees. Absent Respondent's unfair labor practices, it is extremely probable that Roger Mine employees would have transferred to the Defiance Mine in sufficient number to constitute a majority of employees at the Defiance Mine. As the collective-bargaining unit would follow such transfer of equipment and personnel (or here a part of the unit, as only part of the Roger Mine operations were superseded by the Defiance Mine), Respondent would be obligated to bargain with the Mine Workers at the Defiance Mine. This is what the recommended Order requires.

There can, as recognized by the Administrative Law Judge, be no certitude here, but the lack of certainty is caused by Respondent's unfair labor practices. The nature of the unfair labor practices prevents complete restoration of the *status quo ante*. In all likelihood, as is indicated by the facts set forth herein and in the Administrative Law Judge's Decision, had there been no violations of the Act, the Mine Workers would have been the lawful bargaining representative at the Defiance Mine. Although the Operating Engineers, which is the bargaining representative at other of Respondent's mines, is adversely affected by our Order, it is highly improbable that it would have achieved representative status at the Defiance Mine absent Respondent's unfair labor practices. One labor organization should not benefit, however fortuitously, from unfair labor practices directed at another labor organization.

[2] As found by the Administrative Law Judge, the partial closings of the operations at the Roger Mine and the opening of the Defiance Mine were discriminatorily motivated; Respondent moved, rather than closed, a part of its operations; Respondent failed to bargain over the effects of its decision; and Respondent committed other related violations of the Act. For these reasons, among others, *First National Maintenance Corporation* v. *N.L.R.B.*, 452 U.S. 666, 682 (1981), is distinguishable. As the Court stated therein, "An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.'"

Because of the nature of Respondent's strip mining operations, the recommended Order is necessary to provide an effective remedy. The record contains extensive evidence regarding the availability of the type of coal involved and limitations on its recovery due to the terrain, the depth of the coal vein, and Respondent's leasehold rights to mine a particular location. In sum, the economically recoverable coal at any one mine is limited. Thus, to stay in business, Respondent must periodically open new mining operations, and, in the normal course of business, Respondent would be expected to transfer both equipment and personnel from the depleted mine to the new operation. Where, as here, the new mine is opened in relatively close proximity to the old mine, employees at the old mine would be expected to transfer to the new mine. This is what in all likelihood would have happened here if Respondent had not unlawfully prohibited it, and this is the *status quo ante* which the recommended Order restores.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Carbonex Coal Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[3] The instant case is distinguishable from the Board's decision in *Joseph Magnin Company, Inc.*, 257 NLRB 656 (1981), in which the Board refused to order that the employer recognize and bargain with the union in its newly opened store in the absence of a demonstration of majority support among the employees in the new store. Here, unlike *Joseph Magnin*, there was evidence indicating that, but for Respondent's unfair labor practices, a sufficient number of employees would have transferred from the Roger Mine to the Defiance Mine to demonstrate that the Union would have obtained majority status at the Defiance Mine and that Respondent transferred work, equipment, and managerial personnel from the Roger Mine to the Defiance Mine. Under these circumstances, we are satisfied that imposition of a bargaining order at the Defiance Mine is warranted.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we

have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces our employees with respect to these rights. More specifically,

WE WILL NOT recognize International Union of Operating Engineers, Local 627, AFL–CIO, as the exclusive bargaining representative of any of our employees in the appropriate bargaining unit described below for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, until we have complied with the provisions of the Board's Order requiring us to bargain with the United Mine Workers of America and thereafter, unless and until Local 627 shall have been certified by the Board as representative of any such employees.

WE WILL NOT give any force or effect to the collective-bargaining agreement adopted and executed on June 1, 1979, covering our employees at the Defiance Mine in the appropriate unit described below, or to any modification, extension, or renewal of such agreement, provided, however, that nothing herein shall require us to vary or abandon any wage, hour, seniority, or other substantive feature of our relations with such employees under that agreement or prejudice the assertion by these employees of any right that they may have thereunder.

WE WILL NOT encourage membership in Local 627, or any other labor organization, or discourage membership in United Mine Workers of America or any other labor organization, by applying, maintaining, or enforcing an invalid collective-bargaining agreement containing union-security, checkoff, and hiring hall provisions, or by discriminating in any like or related manner in regard to the hire or tenure of employment or any other term or condition of employment.

WE WILL NOT refuse to bargain collectively with United Mine Workers of America concerning the transfer of employees, and other effects upon the employees, resulting from the transfer of unit work from the Roger Mine to the Defiance Mine and our refusing to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with United Mine Workers of America as the exclusive representative of our employees in the following appropriate unit:

All production and maintenance employees, including truckdrivers, employed by us at our Roger Mine and Defiance Mine, near Chelsea, Oklahoma, excluding all other employees, coal processing and loading employees, office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT unilaterally change the terms and conditions of the employment of our represented employees without bargaining with their exclusive collective-bargaining representative.

WE WILL NOT engage in direct bargaining with our represented employees in derogation of the bargaining rights of their exclusive collective-bargaining representative.

WE WILL NOT discriminate, with regard to employees' hire or tenure of employment or any other term or condition of employment, against our employees represented by United Mine Workers of America and in favor of employees represented or referred by Local 627 based on the identity of their collective-bargaining representative.

WE WILL NOT transfer work out of the above-described unit, or accelerate a decision to make such transfer, because of the union activities or sympathies of employees in said unit.

WE WILL NOT refer employee applicants to the Local 627 hiring hall prior to employing them at the Defiance Mine or refuse to employ any applicant at the Defiance Mine who has not been referred by Local 627.

WE WILL NOT hire new employees into a bargaining unit at a time when there are outstanding applications for reinstatement from striking employees in said unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from International Union of Operating Engineers, Local 627, AFL–CIO, as the col-

lective-bargaining representative of any of the employees in the appropriate unit described above, until we have complied with the provisions of this notice requiring us to bargain with the United Mine Workers of America and thereafter, unless and until the Board shall have certified Local 627 as such representative.

WE WILL reimburse each of our present and former employees, excepting those employees who were active members of Local 627 prior to their employment at the Defiance Mine, for all initiation fees, reinstatement fees, dues, and other moneys paid or checked off pursuant to said unlawful union-security contract, with interest.

WE WILL, upon request, bargain collectively with United Mine Workers of America concerning the transfer of employees, and other effects upon the employees, resulting from the transfer of unit work from the Roger Mine to the Defiance Mine.

WE WILL bargain in good faith with the United Mine Workers of America, as the exclusive representative of Defiance Mine employees as part of the above-described appropriate unit, and embody in a signed agreement any understanding reached.

WE WILL offer to as many Roger strikers and laid-off employees as are presently required at the Defiance Mine, reinstatement at, or transfer to, the Defiance Mine to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, present Defiance Mine employees not in that group of strikers and laid-off employees.

WE WILL offer to Roger strikers, who were discriminatorily denied reinstatement at Roger Mine, reinstatement to their former or substantially equivalent positions at the Roger Mine without prejudice to their seniority or other rights and privileges discharging, if necessary, any replacements hired after the commencement of the strike.

WE WILL place all Roger strikers and laid-off employees for whom we have no immediate position available at either the Roger Mine or the Defiance Mine on a preferential hiring list for reinstatement at either the Roger Mine or the Defiance Mine and offer them immediate and full reinstatement on the same conditions as above as vacancies occur.

WE WILL make whole each of the above-described strikers and laid-off employees for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

CARBONEX COAL COMPANY

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: The hearing in this matter was held before me in Tulsa, Oklahoma, on various dates in June and August 1980. The charge was filed by United Mine Workers of America, herein called the Union or UMW and served on Carbonex Coal Company, herein called Respondent or Carbonex, on May 18, 1979. A first amended charge was filed by the Union and served on Respondent on October 12, 1979. The complaint which issued on December 31, 1979, alleges that Respondent violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act.

The principal issues herein are:

(1) Whether Respondent rendered aid, assistance, and support to International Union of Operating Engineers Local 627, AFL-CIO, herein called OE or Local 627, and discriminated against its employees represented by UMW by granting recognition to, bargaining with, and giving effect to a collective-bargaining agreement with, Local 627 as the exclusive collective-bargaining representative of employees at its Defiance Mine notwithstanding that at the time Respondent did not employ a representative segment of its ultimate employee complement at said mine; and by complying with the exclusive hiring hall provisions of said collective-bargaining agreement; and by requiring job applicants to acquire membership in Local 627 prior to employment at the Defiance Mine.

(2) Whether Respondent refused to bargain with UMW in violation of Section 8(a)(5) of the Act and discriminated against its employees in violation of Section 8(a)(3) of the Act by unilaterally granting wage increases to, and engaging in direct bargaining covering shift schedules with, unit employees at its Roger Mine; and by performing work at its Defiance Mine which had previously been performed by unit employees at its Roger Mine, without notification to, or bargaining with, UMW.

(3) Whether Respondent violated Section 8(a)(1) and (3) of the Act by hiring new employees at its Roger Mine to perform work previously performed by employees on strike at the Roger Mine even though said strikers have made unconditional offers to return to work.

Upon the entire record, from the demeanor of the witnesses, and after due consideration of post-hearing briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Oklahoma corporation, is engaged in a coal mining operation near Chelsea, Oklahoma. During the 12 months preceding the issuance of the complaint herein, a representative period, Respondent in the course

and conduct of its business operations has had gross sales in excess of $50,000 and has sold and shipped goods valued in excess of $50,000 to customers located outside the State of Oklahoma.

The complaint alleges, Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that UMW and Local 627 each is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction and Background*

Respondent is engaged in the strip mining of coal at various locations in Oklahoma. Respondent is a subsidiary of Petroleum Reserve Corporation, herein called PRC, which is owned by Skye Resources Ltd., a publicly held Canadian corporation. Although there is some dispute as to when and why PRC began its present method of handling its coal mining activities in Oklahoma, it is undisputed that commencing some time prior to the hearing herein, and continuing to date, it has utilized a multicorporation structure comprised of Respondent, PRC Resources Corporation, herein called PRC Resources, and Chaparral Productions, Inc., herein called Chaparral.

PRC Resources owns the land and coal leases utilized in the mining operation. Chaparral owns most of the major equipment used in the mining operation and Respondent is the operating company. Respondent, in its mining operations, leases equipment from Chaparral and coal reserves from PRC Resource. Frank Podpechan is president of all four companies. William L. Peacher is executive vice president of PRC, treasurer of Respondent, and vice president of both Chaparral and PRC Resources. Different people hold the various other offices in these companies.

Respondent has operated four mines, the Porum Mine, the Stigler Mine, the Roger Mine, and the Defiance Mine. In 1975, PRC acquired a 50-percent interest in the Carbonex Mineral Partnership which owned Porum Mine, an operating mine, located roughly 90 miles south of Tulsa, Oklahoma. The other 50 percent of that partnership was owned by the Carbonex Mining Partnership which was comprised of a group of German individuals. In 1976, PRC established the Stigler Mine, solely owned by it, located 100 to 110 miles south of Tulsa. In that same year, the Roger Mine commenced operation. The Roger Mine was owned by PRC Carbonex Partnership. PRC had a 55-percent interest in that partnership and the other 45 percent was owned by the Roger Mine partnership comprised of a group of individual German investors.

Although Respondent was in existence, at least by 1976 or 1977, it owned no interest in the Porum, Stigler, or Roger Mines. PRC and the Carbonex Mining Partnership each owned 50 percent of Respondent's stock. According to William L. Peacher, executive vice president of PRC, Respondent was formed solely as an operating company to operate the Stigler Mine on the behalf of PRC and to operate the Porum and Roger Mines on behalf of the respective partnerships. It had a written management contract dated August 15, 1974, covering the Porum Mine, and one dated August 15, 1975, covering the Roger Mine.

According to Peacher, effective July 1, 1977, PRC purchased the interest of its partners in the partnerships which owned the Porum and the Roger Mines and also acquired all of Respondent's stock. At the same time, Peacher testified, PRC began utilizing PRC Resources and Chaparral as the owner of its coal leases and equipment. As indicated below, Charging Party questions this alleged timing since the assignment of mining leases, and certain deeds, though dated July 1, 1977, were not recorded until November 2 and 4, 1977. Also the transfer of title to certain trucks are dated January 31, 1978, and recites in lieu of an excise tax receipt number, "change in company name," and the bookkeeping entries reflecting the transfer of ownership of other equipment from the various partnerships[1] to Chaparral were not made until March 1978.

It is undisputed that since 1974 or 1975, Respondent has operated the four mines mentioned above whenever those mines were in operation. All of the mines are engaged in strip mining whereby work is performed in areas called pits. The width of the pits depend upon the size of the earth-moving equipment. For the equipment used by Respondent, the width is around 70 feet. The length of the pit is determined by property, road, or coal boundaries; the longer the pit the more cost efficient the operation due to the more efficient utilization of the earth-moving equipment. Once the overlay of rock, shale, and dirt is removed from atop a seam of coal, it is referred to as the spoils and is cast to one side. When the coal is removed from one pit, another pit is started immediately adjacent thereto. The spoils from the second pit is cast into the first pit as backfill and so on until the entire area is mined.[2]

Since it commenced operations, Respondent has mined three different seams of coal—a high sulphur coal known as Iron post coal or Fort Scott coal, a low sulphur coal known as Sequoyah or crow berg coal, and the Stigler seam which contains both high sulphur and low sulphur coal. To distinguish it from the low sulphur coal mined at Stigler, Respondent referred to the high sulphur coal from the Stigler seam which was mined at Porum, as Porum coal.

Although it is not absolutely clear from the record, it appears that the Stigler Mine and the Porum Mine were basically one-pit operations, except that during some period of time in 1977 and 1978, Porum had two pits. Similarly, it is not clear from the record as to the number of pits at the Roger Mine when it commenced

[1] The books never reflected PRC's sole ownership.

[2] The term "pit" or "pit property" is also used to describe a particular property being mined that is a series of contiguous pits as described above which comprises the total area mined in one location.

operating in 1976. However, it appears that there was only one and it is clear that in May 1977 there was only one pit at the Roger Mine, the Page pit, which mined Sequoyah coal. The Nowatta-Fort Scott pit which opened in June or July 1977 about 1-1/4 miles from the Page pit operated through May 1978 mining Fort Scott coal. The Holly-Sequoyah pit which mined Sequoyah coal opened about February 1978. The Holly-Fort Scott pit opened in approximately April 1978, mining Fort Scott coal about 4 miles from the Page pit. As of September 1978, the Roger Mine was operating three pits—the Page pit, the Holly-Sequoyah pit, and the Holly-Fort Scott pit.[3]

Heavy earth-moving equipment is used to remove the overburden. Basically a piece of heavy-duty equipment called a drill is used to drill holes of about 6-1/2-inch diameter into the overburden down to the coal. Explosives are loaded into the hole and exploded so as to loosen the rock and soil. The overburden is removed usually either by a dragline or a front-end loader, both of which are pieces of heavy-duty equipment. Occasionally, a scraper is used. Once the overburden is removed, a loader is used to clean the coal (scrap off the bone and blue shale), remove and load it into trucks. Sometimes a piece of equipment called a broom is used to help clean the coal. The trucks transport the coal to river barges or a coal-loading facility known as a tipple, where it is dumped or conveyed onto the mode of transport used to transport the coal to the customer. Other equipment used by Respondent are bulldozers and service trucks.

Production personnel employed by Respondent are dragline operators, dragline oilers, loader operators, scraper operators, bulldozer operators, drillers who operate the drills, shooters who load the explosive into the holes, mechanics, handwelders, and service truck operators. The trucks used to transport the coal to the tipple are not owned by PRC or any of its subsidiaries nor are the drivers or any other person on these trucks employees of PRC or any of its subsidiaries. Day-to-day supervision at the mines is performed by a mine superintendent, who has overall responsibility for the operation of the mine, and pit foremen who direct the work of the employees.

The Porum and Stigler Mines were located about 18 to 20 miles apart and at some point in time, they shared a superintendent, some employees, and some equipment. In September 1976, Local 627 commenced an organizing campaign among Respondent's employees. Subsequently, following a third-party card check, Respondent recognized Local 627 as the statutory bargaining representative of its employees at the Porum and Stigler Mines.[4] In December 1976, Respondent and Local 627 entered into a collective-bargaining agreement which provided, *inter alia:*

ARTICLE III

SCOPE OF WORK

This Agreement shall include all mining of fossil fuel products and mine plant activities including operation and maintenance, the necessary site and access preparation work, erection and assembly of mining machinery and equipment, and all related activities except that this Agreement does not apply to other construction activities customarily recognized as being building construction.

ARTICLE IV

RECOGNITION

The Employer recognizes the Union as the exclusive bargaining representative for all employees of the Employer employed in surface and/or underground industrial mining activities within the geographical area of the State of Oklahoma, excluding all office and clerical employees, professional employees, guards and watchmen, and supervisors as defined by the National Labor Relations Act, as amended, and excluding all employees at the Roger Mine near Chelsea, Oklahoma.

* * * * *

ARTICLE XX

JOB VACANCIES AND SENIORITY

1. Permanent job vacancies will be posted on bulletin boards and all employees who feel qualified may apply. . . .

* * * * *

4. If the Employer opens a new mining operation covered by this Agreement employees at existing mining operations shall have the right to request a transfer to such new mining operation; such request shall be made within fourteen (14) days after notification by the Employer of the opening of the new mining operation. In the event such transferee is laid off at such new mining operation, the transferee shall for one year from date of lay-off, be given a preferential right to fill any job vacancy at any other mining operation of the Company covered by this Agreement, subject to the job bidding rights of employees permanently assigned to such other mining operations. Such transferee shall be placed on the seniority roster based upon his original date of hire with the Company.

5. It is understood that Porum-Stigler operation is a single mining operation.

Subsequent agreements effective from June 1, 1978, through May 31, 1979, from June 1, 1979, through May 31, 1981, contain identical provisions.

On June 20, 1978, a Board-conducted election was held among Respondent's production and maintenance employees at the Roger Mine. UMW won the election

[3] One employee witness mentioned a fifth pit, the Roger-Fort Scott pit which was in operation at sometime during his period of employment which was from September 1977 until the time of the October 1977 strike. It is unclear as to the exact period during which the pit was in operation.

[4] Local 627's organizational efforts at the Roger Mine were unsuccessful.

and was certified on June 28, 1978, as the exclusive bargaining representative of said employees. Thereafter, UMW and Respondent engaged in contract negotiations but no contract was consummated. Sometime between June 20 and July 14, 1978, Respondent laid off 18 of its 60 to 70 employees at the Roger Mine. Following an unsuccessful attempt to secure a collective-bargaining agreement, UMW commenced a strike against Respondent at the Roger Mine on October 2, 1978. The picketing continued until sometime in November 1978.

On November 13, 1978, a complaint issued in Cases 16-CA-7964 and 16-CA-8116 alleging that Respondent had engaged in certain unfair labor practices.[5] Subsequently, the Board affirmed the findings and conclusions of the Administrative Law Judge that Respondent violated the Act in the following regards:

1. By threatening its employees with mine closure because of their union activities; interrogating its employees about their union activities; creating the impression of surveillance of its employees' union activities; soliciting grievances of its employees in order to discourage the employees' union activities; soliciting employees' assistance in determining its employees' willingness to form a company union; informing its employees it would be futile to support the United Mine Workers of America; directing its employees to remove Union stickers from their helmets; threatening its employees with termination of employment because of their union activities; soliciting its employees to support another labor organization or a company union; and promising its employees economic benefit in order to discourage their union activities; Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By laying off and thereafter refusing to reinstate its employees named below on the dates opposite their respective names, because of its employees union activities, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act:

Junior A. Berry	June 28, 1978
Ed Davenport	June 29, 1978
Derrell L. Jordan	June 29, 1978
Jimmy E. Legates	June 27, 1978
Charles R. Lewis	June 28, 1978
James M. Lewis	June 28, 1978
Jerry D. Magnes	June 29, 1978
Wayne M. Moore	June 23, 1978
Rex Daniel Rymer	June 27, 1978
Paul D. Pinkston	June 29, 1978
James Presfield	June 29, 1978
Howard W. Robinson	June 20, 1978
Roy J. Stephenson	June 20, 1978
William R. Swick	July 14, 1978
Hooley G. Thompson	June 21, 1978
Howard M. Timms	June 28, 1978
Mark W. Walker	June 28, 1978
Pete Triplett	June 28, 1978

3. By engaging in surface bargaining and not bargaining with a sincere intention to arrive at an agreement with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. Respondent, by engaging in the above-mentioned unfair labor practices, caused and prolonged a concerted work stoppage and strike by various employees in the above-described unit, commencing on or about October 2, 1978, at its Roger Mine.

5. Respondent, by terminating and thereafter refusing to reinstate its employees named below on October 2, 1978, because of its employees involvement in the above-mentioned strike, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act:

William Robinson
Edward Williams
Lester Robinson, Jr.

6. Respondent, by subcontracting 100 percent if its hauling operations on or about June 28, 1978, and laying off two of its trucker employees (included among those employees named in subparagraph 4, above) because of its employees union activities and without bargaining with the above-named labor organization, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act.

As a remedy, the Board ordered, *inter alia:*

1. Reinstatement and backpay for the laid off and terminated employees.

2. That the initial period of UMW's certification as the bargaining representative of production and maintenance employees, including truckdrivers, at Respondent's Roger Mine be construed as beginning on the date Respondent commences to bargain in good faith with UMW.

3. That Respondent offer to strikers, upon their unconditional applications to return to work,[6] immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, persons hired on or after October 2, 1978, and make them whole for any loss of earnings they may suffer as a result of Respondent's refusal, if any, to reinstate them in a timely fashion

[5] Consolidated therewith were certain allegations of unfair labor practices committed by UMW. A settlement agreement was approved disposing of these allegations and the cases against UMW were served from those against Respondent.

[6] The Administrative Law Judge found that although the picketing stopped during November 1978, the facts failed to show that the Union had ended the strike or made an unconditional offer for the employees to return to work.

by paying to each of them a sum of money equal to that each would have earned as wages during the period commencing 5 days after the date on which each unconditionally offers to return to work to the date of Respondent's offer of reinstatement, less any net earnings during such period. The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. Accordingly, if Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.[7]

4. That Respondent bargain in good faith with UMW and reestablish its own hauling operations to the extent those operations existed prior to the June 20, 1978 election.

B. *The 8(a)(3) and (5) Allegations Involving Conduct at the Roger Mine*

1. The shift change

The facts as to the shift change are undisputed. Prior to April 1979,[8] the dragline operators and oilers worked 8-hour shifts, 6 days a week. On April 2, while the dragline was being repaired, three employees who worked on the dragline approached Larry Gallo, superintendent of the Roger Mine[9] and told him they had worked out a 12-hour schedule which they would like to have instituted. They further said that they had previously worked a 12-hour schedule.[10] The following day, March 3, Gallo discussed the possibility of such a schedule change with these three employees and two or three other employees. The change went into effect on March 4. Gallo admits that there was no notification to, or consultation with, UMW.

Respondent argues that this alleged violation is barred by Section 10(b) of the Act. The complaint initially alleged that the conduct involving the shift schedules occurred on June 15, but during the course of the hearing the date was amended to March 2 to conform to the evidence. Respondent's argument is based on the fact that such an allegation was not specifically contained in a charge until the first amended charge filed on October 12. I find no merit in this contention. The original charge filed on May 18 alleges, *inter alia:*

> Since on or about November 15, 1978, the above-named Employer, through its officers, agents and representatives, has refused to bargain collectively with the United Mine Workers of America, a labor organization, chosen by a majority of its employees in the appropriate unit as their collecitve-bargaining representative, by refusing or failing to bargain with the United Mine Workers of America relative to the terms and conditions of employment at the Employer's Defiance Mine. . . . By the above and other acts, the above-named Employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

It is thus clear that the substance of the allegation of the amended charge is sufficiently related to the allegations contained in the original charge so as to render the amendment timely under Section 10(b) of the Act. *N.L.R.B.* v. *Jack LaLanne Management Corporation*, 539 F.2d 292, 294–295 (2d Cir. 1976); *Schraffts Candy Company*, 244 NLRB 581, fn. 1 (1979).

I similarly find no merit in Respondent's assertion that the rearrangement of the shift schedule did not really constitute a change inasmuch as Respondent had worked 12-hour shifts on another dragline in a previous year. Respondent's reliance on *KDEY Broadcasting Company, a wholly owned subsidiary of North America Broadcasting Company*, 225 NLRB 25 (1976), and *Kal-Die Casting Corporation*, 221 NLRB 1068 (1975), is misplaced. The change involved herein does not involve routine production scheduling nor is this a situation where the working schedule is frequently changed. Similarly misplaced is Respondent's reliance on *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), where the Board dismissed an allegation of a refusal to bargain by effectuating a unilateral change in work schedule inasmuch as the Union had not requested bargaining. Here, contrary to the situation in that case, there is no evidence that the Union had actual notice of the change prior to its implementation. Accordingly, since it is undisputed that Respondent implemented this change in the shift schedule without notification to or consultation with UMW, I find that Respondent thereby violated Section 8(a)(1) and (5) of the Act. *Florida Steel Corporation*, 235 NLRB 941 (1978).

2. The wage increase

By letter dated September 24, Russell E. Wienecke, vice president of Respondent,[11] informed Steve Galati, director of UMW's western region, that Respondent planned to institute a wage increase. The body of the letter reads:

> Since the employees at our Roger mine have not had a wage increase since October 1, 1978, Carbonex expects to institute the attached wage schedule on October 14, 1979.
>
> If you have any comments or questions, please let me know.

UMW did not respond directly but on October 9, it filed the first amended charge herein which alleges, *inter alia*, that Respondent has refused to bargain with UMW by announcing a wage increase. On that same date UMW's attorney, Richard Noble, informed Respondent's attorney, Richard Barnes, that UMW wished to resume nego-

[7] *Newport News Shipbuilding and Dry Dock Company*, 236 NLRB 1637 (1978).

[8] All dates hereinafter will be in 1979, unless otherwise indicated.

[9] Gallo assumed this position on October 1, 1978.

[10] One of the draglines had been operated on 12-hour shifts in 1978.

[11] Wienecke is also secretary of PRC Resources.

tiations and requested available dates during the latter part of October and early November. No mention was made of Wienecke's September 24 letter.

Gallo admits that a couple of days before Respondent learned of the filing of the amended charge, he informed unit employees that they would be granted a wage increase. Upon learning of the filing of said charge, Gallo told employees that the charge had been filed and that it would be determinative of whether they received a wage increase.

On October 23, Wienecke sent a mailgram to Galati, the body of which reads:

> ON SEPTEMBER 24, 1979, WE WROTE YOU CONCERNING OUR PROPOSAL TO GRANT A WAGE INCREASE AT THE ROGERS MINE, SINCE THE LAST INCREASE FOR ANY OF THOSE EMPLOYEES WAS THAT IMPLEMENTED OCTOBER 1, 1978, AS AN INTERIM WAGE INCREASE DURING COLLECTIVE BARGAINING WITH YOUR UNION. TO DATE, WE HAVE HEARD NOTHING FROM YOU AND ASSUME YOU HAVE NO OBJECTIONS TO OUR PROPOSAL. THE PAYROLL FOR THE PERIOD COMMENCING OCTOBER 14, 1979, WILL BE MADE SHORTLY AFTER OCTOBER 28.
>
> HOWEVER, WE RECEIVED A PUZZLING AMENDMENT TO NLRB CASE NUMBER 16-CA-8500, SIGNED BY RICHARD W NOBLE. IN THAT AMENDMENT, MR NOBLE ALLEGED THAT OUR COMPANY HAS REFUSED TO BARGAIN WITH THE UMWA "BY BYPASSING THE EMPLOYEES REPRESENTATIVE AND BARGAINING DIRECTLY WITH EMPLOYEES AND BY ANNOUNCING A WAGE INCREASE WITHOUT BARGAINING WITH THE UNITED MINE WORKERS."
>
> WE ASSUMED THERE WAS A BREAKDOWN IN COMMUNICATION BETWEEN YOURSELF AND MR NOBLE. HOWEVER, IF THIS IS YOUR UNION'S METHOD OF RESPONDING TO A LEGITIMATE PROPOSAL AND A REQUEST FOR COMMENT THEREON WE ARE VERY DISTURBED. THESE EMPLOYEES HAVE HAD NO WAGE INCREASE FOR OVER A YEAR, AND WE MUST ASSUME THAT YOUR USE OF ADMINISTRATIVE CHARGES TO HARASS THE EMPLOYER INTO WITHHOLDING A WAGE INCREASE IS AN ATTEMPT TO PENALIZE THE EMPLOYEES AT THE ROGERS MINE. WE REMIND YOU THAT ALL OF THOSE PERSONS ARE EMPLOYEES WHO ABANDONED YOU UNION'S STRIKE WHICH BEGAN IN OCTOBER, 1978, AND CROSSED YOUR PICKET LINE AND RETURNED TO WORK. WE WILL NOT BE A PARTY TO ANY DIRECT OR INDIRECT ATTEMPT TO DISCRIMINATE AGAINST THESE INDIVIDUALS.
>
> IF YOU HAVE SPECIFIC COMMENTS TO MAKE CONCERNING OUR PROPOSAL, PLEASE BY IN TOUCH WITH US AT YOUR EARLIEST CONVENIENCE, OTHERWISE WE WILL ASSUME EITHER YOU HAVE NO OBJECTION OR THAT YOUR OBJECTION IS FOUNDED UPON AN ATTEMPT TO DISCRIMINATE AGAINST PERSONS WHO HAD ABANDONED YOUR STRIKE.

Gallo testified that he, Wienecke, and William Peacher, executive vice president of PRC and treasurer of Respondent, made a joint decision to distribute copies of the above mailgram to unit employees. Thereafter, a copy was handed to each employee at work and a copy was mailed to each employee on leave. According to Gallo, they decided to distribute copies of the mailgram because he had previously told employees that they would be receiving a wage increase and this distribution was an explanation of why they would not be receiving such increase. Subsequently, unit enployees were granted a wage increase.

On October 24, Noble sent a letter to Wienecke, the body of which states:

> This letter will acknowledge receipt of your telegram of October 24, 1979 to Mr. Steve Galati relative to the proposed unilateral implementation of a wage increase at Carbonex Coal Company's Rogers Mine. Apparently, you are unaware of the United Mine Workers of America's prior requests to reopen negotiations.
>
> I direct your attention to Mr. Steve Galati's letter of April 18, 1979 requesting the reopening of negotiations. Mr. Galati followed up on the letter of April 18 with a letter dated May 2, 1979, again requesting that negotiations be commenced and a statement of available dates for the commencement of further negotiations. Your chief negotiator, Mr. Richard L. Barnes, responded to Mr. Galati by letter dated May 2, 1979 stating that the Company had no proposals to offer other than those previously submitted and that the Company would offer no further proposals save a proposal on subcontracting. Apparently, Carbonex Coal Company's position relative to its initial proposals remains the same despite the Administrative Law Judge's finding that the Company engaged in surface bargaining.
>
> On October 9, 1979 I corresponded with your chief negotiator, Mr. Richard L. Barnes, requesting a resumption of negotiations and a commitment as to available dates for negotiations in late October or early November, 1979. There has been no response to this request for the resumption of negotiations. The United Mine Workers of America is willing and has sought the resumption of collective bargaining negotiations relative to any subject appropriate for collective bargaining. Your Company has chosen not to avail itself of these many offers to resume negotiations. If your position is now changed, please advise as to a recommended date and site for the resumption of negotiations.

Wienecke responded, by letter dated October 31, addressed to Noble, the body of which reads:

> Carbonex has, on several occasions, afforded the United Mine Workers an opportunity to respond to the Company's proposal to increase the wage rates at the Rogers mine since they have not had an increase in wages in over a year. To date we have not received any direct response to the proposal. Consequently, we will implement the increase as proposed.

> Your interpretation of the letter of May 2, 1979, from Mr. Barnes to Mr. Galati, is in error. Neither the May 2 letter, nor any other of which I am aware, contains the statement with regard to further Company proposals that you attribute to Mr. Barnes. Furthermore, contrary to your conclusion that the Company has chosen not to avail itself of opportunities for negotiations, Mr. Barnes specifically stated in the May 2 letter that the Company was willing to meet and to bargain and he solicited advance copies of further proposals to be made by the Union, if any, in order to save time during the anticipated face-to-face meetings. Presumably, however, the Union had no intention of making any further bargaining proposals, as none were forthcoming. In fact, to my knowledge, neither you nor the Union chose to respond in any manner to the May 2 letter.
>
> In addition, on May 29, 1979, in preparation for the expected continuation of collective bargaining sessions, Mr. Barnes wrote to Mr. Harrison Combs with the International Union requesting certain information. Mr. Barnes has informed us that, despite follow-up requests, the Union has chosen not to respond to this letter as well.
>
> Notwithstanding the Union's lack of cooperation with regard to the reasonable requests for information that the Company has made, we are still willing to meet and to bargain. We would, however, reiterate the requests contained in the May 2 and May 29 letters and ask that the requested information be provided as soon as possible.
>
> We would suggest Tulsa as the site for further meetings. Mr. Barnes will not be available until after November 6. If you would suggest a date or dates subsequent thereto, we will make arrangements for a meeting. We would propose that either a Federal Mediator be present at all future sessions or that the parties agree on a procedure for taking minutes.

Noble replied by letter dated November 2 addressed to Wienecke the body of which reads:

> This letter will acknowledge receipt of your letter of October 31, 1979.
>
> The United Mine Workers of America has consistently responded to Carbonex Coal Company's proposal for increasing wages by requesting further face to face negotiations. Consistently since mid-April, 1979 the United Mine Workers of America has requested such negotiations. It is now the position or has it always been your position that there can be no face to face negotiations without proposals other than those already made being submitted?
>
> Am I to understand from your letter of October 31, 1979 that Carbonex Coal Company is unwilling to discuss and/or modify any of the proposals made in any of the previous negotiations sessions?
>
> Both the Western Region Office and I are unaware of any requests for information made to Mr. Harrison Combs. It would seem that if you do in fact want information, the appropriate individual to contact would [sic] Mr. Steve Galati, who has been assigned to negotiate any agreement with Carbonex Coal Company on behalf of the affected employees in the International Union. If you still want any information which was the object of Mr. Barnes' May 29, 1979 letter, please forward a copy of that letter to Mr. Galati or myself.
>
> The United Mine Workers of America suggest that negotiations be resumed on November 19, 1979 and November 20, 1979, in Tulsa, Oklahoma. Please advise as to whether these dates are acceptable.
>
> The United Mine Workers of America has no objection to the presence of a Federal Mediator at any bargaining session. However, the United Mine Workers of America would strenuously object to the taking of minutes of any negotiating session other than the individual notes of the parties' negotiators.
>
> Please advise as to whether Mr. Barnes remains the Company's chief negotiator. Since it appears that his availability is essential to future negotiations, communication would be facilitated if there is only one Company representative with whom we correspond.

By letter dated November 9, Barnes responded to Noble's November 2 letter. This letter states, *inter alia:*

> Your letter to Mr. Wienecke is nonresponsive. The Company's various letters regarding collective bargaining have been abundantly clear. Any alleged misunderstanding on your part is apparently a product of your own imagination. The Company's position is now and always has been to enter negotiations without constraint. We have given the Union lengthy explanations for the rejection of each and every proposal rejected. The Union has not yet convinced the Company that such rejection is unwarranted.
>
> * * * * *
>
> The Company has asked me to continue to counsel them during negotiations. I am unavailable November 19 and 20 because of negotiations with the Furniture Workers in another city. December is spotty because of preparation for the resumption in early January of a complex and lengthy trail. Please furnish a list of all available dates between November 21 and January 6.

Thereafter by letter dated November 13, an associate of Noble informed Barnes that the Union's schedule was flexible and suggested that, in view of Barnes' tight schedule, he propose a date for negotiations. By letter dated November 17, Barnes listed 10 dates between November 6 and December 28 on which he would be available for negotiations. Neither the November 13 nor the November 17 letter made any specific reference to the proposed wage increase. In fact throughout the inter-

change of correspondence the union representatives never mentioned specifically the proposed wage increase, other than the reference in the November 2 letter. Rather, its consistent response was to request general contract negotiations.

Respondent argues that the failure of UMW to specifically request bargaining as to the proposed wage increase constitutes a waiver of UMW's statutory right to bargain as to the wage increase. In so doing, Respondent relies on that line of cases which hold that it is incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely request bargaining in order to preserve its right to bargain on that subject. See *Citizens National Bank of Willmar, supra*, and cases cited therein at fn. 6.

Such reliance is mistaken, in the circumstances herein. UMW's request to reopen contract negotiations encompasses a request to bargain regarding wages in the context of other contract proposals. However, even assuming, *arguendo*, that such is not the case, Respondent's reliance is still misplaced. The Board in *Carbonex Coal Company*, 248 NLRB 779 (1980), affirmed the Administrative Law Judge's conclusion that during the contract negotiations which took place in August and September 1978 and which Respondent broke off on September 15, allegedly because of the unfair labor practice proceedings, Respondent had engaged in surface bargaining without a sincere intent to arrive at an agreement with UMW and ordered Respondent to bargain in good faith. On April 18, by letter, UMW requested the reopening of negotiation, claimed the Defiance Mine as being within the unit represented by it, suggested several possible dates in April and May, but stated that it would meet at Respondent's convenience. After receiving no response from Respondent, UMW by letter dated May 2, reiterated its request for bargaining and further stated, "continued failure on your part to respond to our requests can only lead us to take further actions available to us under the law."

Respondent responded by letters dated May 2 and 8, neither of which suggested dates for negotiation sessions. The body of the May 2 letter states:

> Your letter to the company dated April 14, 1979, has been referred to me for response because of present litigation between the company and your union, and the several legal problems referred to in you letter.
>
> Of course, the company is willing to meet and to bargain. However, from its vantage point there appears to be little or no hope of progress. First, is the matter of company proposals that have been attacked in the administrative proceedings before the NLRB. Until final resolution of the propriety or legality of those proposals, the company is unwilling to withdraw them. Perhaps you are now willing to reconsider your rejection of these proposals, or to offer real counterproposals rather than reproposing previous rejected proposals.
>
> Second, are the additional items on which the parties reached an impasse. The company has fully explained its position on rejecting all of those union proposals, and is presently awaiting some response from you other than a reproposal of previously rejected proposals.
>
> My review of the bargaining indicated only two areas which were not fully explored, those being wages and subcontracting. The company did reject any wage increase other than the tonnage bonus, but the agreement for temporary implementation of that plan expired December 31, 1978. Subcontracting was on the agenda for September 14–15, 1978, but was never discussed. The company's proposal dated September 14, 1978, is enclosed.
>
> All of the employees of Carbonex Coal Company who work within the State of Oklahoma, except those working at the Roger Mine, are members of the International Union of Operating Engineers, and have been covered by a collective bargaining agreement with Local 627 of that union since 1976. Therefore, the company could not lawfully bargain with your union concerning the employees at the Defiance Mine, or any other mine in Oklahoma except the Roger Mine for which your union became the certified bargaining representative in June 1978.
>
> You were furnished a copy of the current Operating Engineers contract during the September 14–15, 1978, negotiating season with Carbonex.
>
> With the exception of Article II, Section (d) and (f), the company has had no counterpropals from you. It would appreciate advance copies of them so that they can be reviewed prior to meeting. Such review usually saves a great deal of meeting time.

The body of the May 8 letter states:

> Apparently your May 2, 1979, letter and my letter to you crossed in the mail.
>
> Obviously the Company is concerned about the resumption of picketing or a strike. Please let us know at your earliest convenience if you do *not* include picketing or a strike as being within "actions available to us under the law."

Thereafter there was no communication between Respondent and UMW regarding contract negotiations until UMW's request for bargaining on October 9. In this regard, I note that Respondent's September 24 letter regarding its intent to institute a wage increase does not request bargaining as to an increase. Rather it flatly announces that Respondent expected to institute a unilaterally determined wage schedule on October 14 and states "If you have any comments or questions, please let me know." Thus, Respondent notified UMW of its intent to institute a wage increase at a time when UMW's request for contract negotiations was outstanding and while Respondent's bad-faith surface bargaining was still unremedied.

It is well settled that, absent extenuating circumstances, an employer violates Section 8(a)(5) of the Act by instituting unilateral changes in terms and conditions of employment during the course of negotiations with its employees' bargaining representative at a time when no

impasse exist. *N.L.R.B.* v. *Benne Katz, etc. d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962); *Winn-Dixie Stores, Inc.*, 243 NLRB 972 (1979); *Laredo Packing Company*, 241 NLRB 184 (1979). The mere fact that the employees had not had a wage increase for a year is not in itself such a compelling business justification as to constitute an extenuating circumstances justifying Respondent's unilateral action. *Winn-Dixie Stores, Inc., supra* at fn. 9. Also any possibility of extenuating circumstances is negated by Respondent's announcement of the wage increase to employees prior to UMW's response, and its distribution to employees of copies of the mailgram, which I find was carefully calculated to place upon the Union the onus of any failure to grant a wage increase.

It is also apparent that no impasse existed, Respondent admits this in its May 2 letter. Further there can be valid impasse while Respondent's bad-faith bargaining is unremedied. See *United Contractors, Incorporated, JMCO Trucking Incorporated*, 244 NLRB 72 (1979). Accordingly, in these circumstances, I find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally, without bargaining with UMW, granting a wage increase to unit employees at the Roger Mine.

C. *The Alleged Refusal To Reinstate Strikers at the Roger Mine*

As set forth above, in a previous proceeding, the Board upheld the finding of the Administrative Law Judge that the October 2, 1978, strike at the Roger Mine was an unfair labor practice strike from its inception and ordered Respondent to offer the unfair labor practice strikers, upon their unconditional applications to return to work, immediate and full reinstatement, dismissing, if necessary, any persons hired on or after October 2, 1978. *Carbonex Coal Company*, 248 NLRB 779 (1980).

Some of the employees began crossing the picket line to return to work around October 17 or 18, 1978, at which time Respondent began operating one shift, mining Sequoyah coal at the Page pit. Gradually it went back to a three-shift operation, but the scope of the operation never returned to the prestrike level. The picketing continued until sometime in November 1978. No strike settlement agreement or collective-bargaining agreement was ever reached between Respondent and UMW, nor did UMW make any offer on behalf of the strikers to return to work prior to the opening of the Defiance Mine.

From the time the mine resumed operations during the strike and throughout the first quarter of 1979, the active employee complement consisted solely of returning strikers or those employees who crossed the picket line. However, as some of these employees left Respondent's employ, they were replaced with new employees notwithstanding that strikers who had made unconditional applications to return to work had not been reinstated. According to Peacher, Gallo had hired these new employees on his own initiative due to ignorance of the situation. Peacher did not learn of this actien until some time later. They discussed how to handle the situation and decided that Respondent had made the mistake, not the replacements, and thus it would be grossly unfair to simply terminate the replacements. Therefore, they elected not to terminate the replacements so as to reinstate the strikers.

The new employees were hired on the following dates:

Farris, Doug 5-30-79
Farbro, Bobby W. 8-23-79
Howell, Rick R. 7-24-79
Patton, Billy L. 9-8-79
Andrews, William 8-20-79
Lockart, Glen A. 10-8-79

Striking employees made unconditional offers to return to work and were reinstated as follows:

Name	*Offer To Return*	*Offered Job*	*Reinstated*	*Refused*
Pinkston, John A.	11-13-78	3-05-80		3-10-80
Pinkston, Tim	11-13-78	3-10-80		3-18-80
Robinson, Lester	11-13-78	11-19-79	11-26-79 (quit 2-26-80)	
Robinson, William	11-13-78	3-19-80 (dragline)		3-21-80
		4-14-80 (scraper)		4-19-80
Lewis, Edward J.	11-13-78	11-15-78		
Robinson, Howard	11-13-78	(deceased)		
Phifer, Bernie L.	11-14-78		5-14-79 (quit)	
Applegate, Jay	11-22-78	4-05-79	4-05-79	
Shipley, Kenny	11-29-78	5-10-79	4-16-79	
Meek, George	10-09-78		10-18-78	
Keith, Mac A.	12-10-78	3-28-80		4-04-80
Fowler, A. C.	1-11-79	4-11-79	4-16-79	
Greenway, Carl	1-11-79	1-11-79	1-11-79	
Cartwright, Delbert	1-18-79	4-11-79	4-16-79	
Williams, Edward D.	3-07-79	3-21-80	4-03-80	
Jordan, Derrell	4-12-79	11-15-79		

Striker Kenneth Shipley testified without contradiction that on the date he heard that the picket line had been removed, he telephoned Gallo who confirmed that the

picketing had ceased. Shipley asked if they were going to reinstate anyone. Gallo said, if it were up to him, they would but he would have to check with the Tulsa office. A week or two later, on November 29, 1978, Shipley went to the Roger Mine and made an unconditional offer to return to work.

Striker A. G. Fowler testified that about a month after the picketing ceased, he went to the Roger Mine. His uncontradicted testimony is that he asked Gallo if there was any chance of returning to work. Gallo said, "No. But if I have my way, I would put you all back to work. They won't let me. I would like to show them what I could do." Gallo further said something to the effect that they had lost some of the best hands. Fowler was not offered reinstatement until April 11.

The complaint alleges that at various times subsequent to the strikers' unconditional offer to return to work, Respondent has hired new employees at its Roger Mine to perform work previously performed by the striking employees. Respondent argues that this issue is not properly before me inasmuch as it is duplicative litigation of a backpay issue, in another proceeding, apparently referring to the order to reinstate the strikers with backpay where appropriate, and inasmuch as it was not alleged in the charge herein. Further, Respondent argues, in any event it would not constitute a violation of Section 8(a)(1) inasmuch as the hiring of new employees rather than reinstating strikers was inadvertent rather than intentional and was not inherently destructive of employees' rights.

I find no merit in any of these arguments. The original charge specifically alleges a refusal to reinstate strikers upon termination of an unfair labor practice strike. The allegation that Respondent hired new employees rather than reinstating the strikers is intertwined with the allegation of refusing to reinstate the strikers. Thus, there is no substantial variance between the charge and the complaint.

As to being duplicative litigation, the Administrative Law Judge specifically found in the prior proceeding that the facts failed to show that the Union had made an unconditional offer for the strikers to return to work. Further, the Administrative Law Judge made no findings of fact or conclusions of law as to a refusal to reinstate strikers or as to the hiring of new employees and there has been no backpay proceeding related thereto. Thus, the issue herein has not been litigated and the issue is properly before me.

Respondent admits that new employees were, in fact, hired at the Roger Mine rather than reinstating the strikers who had made unconditional offers to return to work. I do not credit Peacher and Gallo insofar as their testimony tends to indicate that this was an inadvertent error on Gallo's part due to ignorance of the situation. Gallo was superintendent of the Roger Mine when the strike commenced. He could not possibly be ignorant of the strike or of the strikers' offers to return to work. Further, ignorance of Respondent's legal obligation to reinstate the strikers is no defense.

Contrary to Respondent's argument, there is probably nothing more inherently destructive of employees' rights than the failure or refusal to reinstate strikers who have offered to return to work while at the same time filling vacancies with new hires. Thus, the Board and the courts have long held that hiring new employees in the face of outstanding applications for reinstatement from striking employees, without regard to whether they are economic or unfair labor practice strikers, is presumptively a violation of Section 8(a)(1) and (3) of the Act, irrespective of the employees' intent or union animus unless the employer sustains the burden of establishing legitimate and substantial business justification for such conduct. *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1968); *N.L.R.B.* v. *Great Dane Trailer, Inc.*, 388 U.S. 26 (1967); *The Laidlaw Corporation*, 171 NLRB 1367 (1968); *Pillows of California*, 207 NLRB 369 (1973).

Respondent has not met this burden. Thus, even without regard to the finding in the prior proceeding that the strikers were unfair labor practice strikers. Respondent was obligated to rehire strikers rather than the six new employees that it hired.[12] Accordingly, I find that by hiring the new employees rather than the strikers who had previously made unconditional offers to return to work, Respondent has violated Section 8(a)(1) and (3) of the Act. Charging Party argues, and apparently the General Counsel joins in such argument, that Respondent's failure to recall employees found in the previous proceeding to have been laid off in violation of Section 8(a)(1) and (3) of the Act is intertwined with and inseparable from Respondent's refusal to rehire strikers and therefore constitutes an independent violation of Section 8(a)(1) and (3) of the Act. Further, Charging Party argues, even though the complaint contains no allegation as to failure to recall laid-off employees, the issue was fully litigated.

I disagree. The record does contain exhibits showing new hires and their initial date of employment and the dates strikers and laid-off employees offered to return and were offered reinstatement. However, no evidence was adduced in support of the laid-off employees' entitlement to those jobs given to new hires. Certainly, in the circumstances herein, the entitlement of the strikers to these jobs must be considered. Accordingly, I find that the failure to recall laid-off employees was not fully litigated and in the absence of a specific allegation in the complaint, no finding of a violation can be based thereon.

D. *The Opening of the Defiance Mine and the Complaint Allegations Related Thereto*

1. Facts

During the first week in October 1978, Respondent made, or accelerated, a decision to open a new mine about 4 miles from the Roger Mine. Respondent reached an oral agreement with the property owners in May or June 1978 to lease the coal rights underlying the location of the new mine; however, it was not until sometime in October that the signatures on the lease of all the owners were secured. These leases are referred to herein as the

[12] The strikers' status as unfair labor practice strikers is immaterial herein since no new employees were hired prior to their unconditional offers to return to work.

Payne-Kell leases. According to Peacher, immediately prior to the October 2 strike, Fort Scott coal was being mined at the Holly-Fort Scott pit at the Roger Mine. In May or June 1978, when agreement was reached as to the Payne-Kell leases, Respondent made the decision that, when it finished mining the Holly-Fort Scott pit, it would begin mining Fort Scott coal on the Payne-Kell properties.

At or about that same time, Peacher testified, he and Respondent's president, Frank Podpechan, began considering whether the Payne-Kell properties would be mined as a separate mine. Podpechan felt that centralized management was not working for Respondent. Peacher felt they should continue with centralized management, that is, mining several pits concurrently at one mine. According to Peacher, it is more complex for a superintendent to manage two pits than it is to manage one pit.

Peacher also testified that the principal advantage of operating two pits at the same mine is that certain equipment, with operator, can be shared and, of course, managerial and clerical personnel and an office is shared, resulting in lower administrative cost and overhead. However, sharing equipment causes scheduling problems and even if you eliminate the need to share equipment, the superintendent has to be responsible for a larger operation, which requires more skill. The primary requirement for a successful multiple-pit operation is managerial skill and Respondent just did not have the qualified managerial personnel to make it work successfully. Porum and Roger each had three different superintendents in 1978. James Smith, the superintendent of the Roger Mine, was terminated in June 1978. They were not having much success securing a replacement. Instead, William Benes, Respondent's vice president in charge of planning was acting superintendent of Roger Mine. Respondent employed the services of a management search firm in 1978, but, in a 6-week period, only one candidate for superintendent was obtained.

Essentially, according to Peacher, while operating two pits at one mine has the potential for reducing cost, there is also the risk that management ability and coordination will be deficient. In the latter circumstance, you not only lose the economy of scale that you hoped to achieve in the first place but you would be worse off than if you had a separate mine for each pit. Peacher further testified that the saving on overhead of operating the pit on the new property under an existing mine would be relatively minor, representing maybe 2 percent of Respondent's production. As to equipment they could possibly have utilized one less coal loader and scraper, resulting in a saving in capital investment. Because of the distance, track equipment such as a bulldozer could not be shared. The coal loader and the scraper are rubber-tired vehicles.

Peacher testified that, prior to the strike, Respondent anticipated that by the end of February or some time in March, the Holly-Fort Scott pit would have been mined to the point where further mining would not have been economically feasible, that is, the amount of overburden which had to be removed to obtain a ton of coal was too high.[13] At that time the new mine would be opened. However, the strike intervened and Peacher admits that the strike caused Respondent to accelerate the date for opening the new mine.

According to Peacher, in order to meet its contractual obligation to furnish customers with Fort Scott coal after the strike commenced, Respondent decided to open up the Payne-Kell leases. The reason these particular leases were chosen was because coal there had a very low strip ratio, comparable to that at the Holly-Fort Scott of 12-to-1 and there were estimated reserves of 160,000 tons of coal. Respondent had no other substantial reserves of Fort Scott coal with anywhere close to the low strip ratio of the Payne-Kell leases. The Holly-Fort Scott pit only had roughly 50,000 tons remaining.

Peacher admits that the strike was the sole reason that Respondent began mining on the Payne-Kell leases prior to exhausting the economically recoverable reserves at the Holly-Fort Scott pit at the Roger Mine. In order to obtain a permit to mine the Payne-Kell leases, Respondent was required by the State to post a reclamation bond. According to Peacher, Respondent is not bondable by an insurance company so it has to post a cash bond. Respondent was required to post a $62,000 bond in cash before it could commence mining on the Payne-Kell leases. According to Peacher, Respondent did not have the necessary cash available so it requested a release from its bond on the Holly lease, which included the Holly-Fort Scott pit, to the extent that the surface had not been disturbed. They were given a release in the amount of about $65,000, which was then used to post the $62,000 bond for the Payne-Kell leases.

As to why Respondent did not resume mining at the Holly-Fort Scott pit once the picketing ceased, Peacher testified that steps had already been taken to obtain a release of the Holly bond. Further, according to Peacher, Respondent still did not know specifically what the strike was about. The strike had not been settled and, as far as they knew, the picketing could resume at any time. Also, the opening of the Payne-Kell leases was simply an acceleration of the timetable for doing something they would have done anyway. Therefore, it did not seem reasonable, at that point, to risk being shut down once again should the picketing resume.

The new hire mine, called the Defiance Mine, produces Fort Scott, coal. Immediately prior to the strike, the Roger Mine had three active pits—the Page pit where the Page dragline was mining Sequoyah coal, the Holly-Sequoyah pit where the Monitowoc dragline was mining Sequoyah coal, and the Holly-Fort Scott pit where a 992 loader was mining Fort Scott coal. When production recommended at Roger following the commencement of the strike, only the Page pit was in operation except for a very brief period when the Holly-Sequoyah pit was operating.

According to Peacher, the employee complement at Roger was too small to operate more than one pit. Gallo testified that when production started around October 17

[13] Employee witness Wayne Moore testified that from his observation prior to strike, there was enough coal left for 6 to 8 months of mining at the Holly-Fort Scott pit.

or 18, they worked only one 8-hour shift.[14] After the picketing ceased they went to a three-shift operation. As indicated above, one striker returned to work on October 18, six offered to return on November 13, one on November 14, one on November 22, one on November 29, and one on December 10. Only two of these were offered reinstatement prior to March. No other striker offered to return to work prior to January 11.

The new mine, called the Defiance Mine, opened during the first week of January, mining Fort Scott coal. Peacher admits that thereafter, the coal mined at Defiance was the only Fort Scott coal being mined by Respondent and that it was used to fulfill Respondent's contractual obligations to supply customers with Fort Scott coal which prior to the strike had been supplied from the output of the Holly-Fort Scott pit at the Roger Mine. No Fort Scott coal has been mined at Roger since the commencement of the strike. The Defiance Mine is located about 5 miles from the Holly-Fort Scott pit at the Roger Mine[15] and the coal mined at Defiance is from the same seam of coal as that at the Holly-Fort Scott.

Both Growitz and Gerald Ellis, business manager of Local 627, admit that in early or mid-December 1978, Growitz and Ellis had a conversation during which Growitz informed him of Respondent's plan to open the Defiance Mine. Ellis said their collective-bargaining agreement required that a notice be posted at Porum giving Porum employees an opportunity to transfer to Defiance and that all new employees hired at Defiance must be referred through the Local 627 hiring hall. Growitz agreed to do so allegedly so as to conform with the requirements of the collective-bargaining agreement between Local 627 and Respondent at the Porum-Stigler Mines which provide that Porum and Stigler are a single mining operation and that Respondent recognize Local 627 as the collective-bargaining representative of all of its production and maintenance employees in its mining operations in the State of Oklahoma excluding the Roger Mine.

Respondent did not notify UMW of the opening of the Defiance Mine. Harvey Haynes, business representative for UMW admits that he first heard in late November 1978 about the Defiance Mine being opened. The record does not establish exactly what knowledge he acquired or how he acquired it. Roger employees were not granted the opportunity to transfer to Defiance. However, from December 5 through 12, 1978, Respondent posted a notice at the Porum Mine notifying employees that it was opening a new mine and that, in accordance with article XX of its current collective-bargaining agreement with Local 627, employees at the Porum Mine may, prior to December 18, request a transfer to the new mining operation. The job openings listed were up to four each dragline operators and oilers,[16] one heavy-equipment operator, one driller/shooter combination, one driller, one welder/mechanic, and one utility.

Around the first or second week in January, the Manitowoc 4600 dragline was transferred from the Roger Mine to the Defiance Mine. Prior thereto, the Manitowoc had been at the Roger Mine since October 1978, but, during the remainder of the year, according to Gallo, it was utilized at Roger only for 4 to 6 weeks. The Page dragline was the one used constantly at Roger during this period. A drill and a 992 front-end loader was also transferred from Roger to Defiance and, on two occasions, Roger loaned Defiance a bulldozer for a short period of time. Gallo further testified that Roger and Defiance shared a motor grader or blade and also a water truck.

Scraper operator Kenneth Shipley testified that they also shared spare tires for the scrapers. Employee Wayne Moore testified that Roger and Defiance have also shared a broom, a welding truck, and a service truck.

The first three production and maintenance employees at Defiance began working on January 8. They were all new hires referred for employment at Defiance from the Local 627 hiring hall. Jim Cooper was superintendent. Ellis testified that on January 9 or 10 he approached Cooper at the Defiance Mine site. The three employees—Vermon Barnes, Cullus Jones, and Billy Brashaw—were with him. Ellis told Cooper Local 627 represented the employees at Defiance Mine and he had the employees there with him to prove it. Growitz admits that Respondent began implementing the Porum Local 627 collective-bargaining agreement at the Defiance Mine from the first day an employee commenced working at Defiance, including checkoff of supplemental dues, requiring all applicants for employment to be referred through the Local 627 hiring hall, requiring employees to become and remain members of Local 627 after their 30th day of employment, and making contributions to various benefit funds.

A fourth employee began work on January 14 and a fifth commenced working on January 15. At least one was a new hire referred by Local 627. Five additional employees commenced working during the 2-week payroll period ending February 23. At least four of them were new hires referred by Local 627. Five more employees commenced working during the payroll period ending March 9. All of them were new hires referred by Local 627. During the ensuing month there was some slight turnover but the employee complement remained at 15 employees until the payroll period ending April 20 when 4 employees were hired increasing the employee complement to 18. At least two of these four employees were new hires referred by Local 627. Thereafter no new employees were hired until July 31, when one employee was hired, another employee was hired on September 13 and one was hired on December 19. No other employees were hired in 1979.

The record does not contain payroll records past the payroll period ending May 18 so it is unclear whether the employee complement thereafter prior to September

[14] It is not clear from the record as to the number of employees working at this time.

[15] This distance is by passenger vehicle. Heavy-duty equipment exceeding 10 tons has to travel by a different route which may be longer.

[16] Apparently this would be one each for each of three regular and one relief shift.

dropped below 18.[17] However, it is clear from the list of Defiance employees and their hire dates that, prior to July 31, the total employee complement did not exceed 18. It is not clear from the record whether the two employees hired in July and September were replacing employees who had severed their employment or whether their hire constituted an increase in the employee complement. Growitz testified that as of mid-September the employee complement at Defiance was between 15 and 20 employees.

The record does not directly indicate what employees transferred from Porum to Defiance. Richard Growitz, Respondent's executive vice president, testified in a previous proceeding that he thought three employees transferred from Porum to Defiance but that he could not recollect their names. Peacher testified that three transferred but also gave no names. However, the record contains a list of Defiance employees and their hire dates. Only two of the employees on that list show an original hire date prior to the commencement of their employment at Defiance, Rick Boyd and Tom Green. Boyd's original hire date was in 1977. He commenced working at Defiance on April 4. Tom Green, who began work at Defiance on April 11, was originally hired at the Roger Mine in 1977. He left his employment for some period of time but began working again at the Roger Mine in October 1978 prior to the strike. He returned to work at Roger the day after the picket line went up and worked there throughout the period of the strike.

The record also contains a list of the employees referred by Local 627 to Defiance which indicates that these were already members of Local 627 or shows the date they began paying dues to Local 627. With three exceptions, this information shows that all persons referred by Local 627 to Defiance were either already members of Local 627 (13 employees), or began payment of dues to Local 627 within the month following their employment (7 employees). However, three Defiance employees are not listed as having been referred by Local 627. They are Boyd, who was mentioned above, Carl Stubblefied, who began work at Defiance on February 9, and George Reece, who began work on January 14. Since neither of these three appear on the list of Roger employees prior to the strike, it would seem that Boyd, Stubblefield, and Reece are the three employees mentioned by Growitz and Peacher who transferred to Defiance and I so find. The record does not establish any interchange of employees between Defiance and Porum, or Defiance and Roger.

As set forth above, on April 18, UMW requested the reopening of negotiations and also stated that it specifically wanted to address the issue of employees currently employed at Defiance. In its May 2 letter to Respondent, UMW repeated its request and claimed, on the basis of its Roger certification, that it represented Defiance employees. On May 2, by letter, Respondent declined to recognize UMW as the representative of the Defiance employees on the grounds that all of its employees in its mining operations in Oklahoma, excluding those at Roger, had been represented by Local 627 since 1976.

On May 18, the date it filed the original charge herein, UMW filed a unit clarification petition in Case 16-UC-98 seeking a ruling that the employees at the Defiance mine constituted an accretion to the existing Roger Mine unit. Subsequently on October 29, the Acting Regional Director issued a Decision and Order in which he found that the production and maintenance employees of the Defiance Mine have a separate identity apart from those at the Roger Mine and do not constitute an accretion to the existing Roger unit. Accordingly, the unit clarification petition therein was dismissed.

In May, Respondent and Local 627 began negotiations for a new collective-bargaining agreement covering the Porum and Defiance Mines. During the second negotiation session, in May, Ellis showed Respondent authorization cards from a majority of the employees at Defiance. The negotiations culminated in an agreement and, on June 1, Respondent and Local 627 executed a collective-bargaining agreement covering the Porum and Defiance employees which is effective by its terms from June 1, 1979, through May 31, 1981. As was true of the preceding agreements between Respondent and Local 627, this collective-bargaining agreement provides for Local 627 membership and maintenance thereof as a term and condition of employment, dues checkoff,[18] and that all applicants for employment be obtained, if available, through the Local 627 hiring hall. If Local 627 is unable to furnish qualified workmen within 48 hours, then Respondent may hire from any available source.

In addition to Tom Green, another employee who had worked at Roger prior to the strike was employed at Defiance. This was Leon Moore, who was hired on April 2. Three other Roger employees applied for work at Defiance and were told by the Defiance superintendent that they would have to be referred by the Local 627 hiring hall. They were A. C. Fowler, who applied in January, Hooley Thompson, who applied around the last of February or first of March, and John Lewis, who applied in August.

According to Fowler when he telephoned Local 627 and asked if there were any chance of him going to work at Defiance, he was told there was no chance but that they would take his name and address and call him if he were ever needed. He was never called. Tom Green, who was on withdrawal from Local 627, went to the Local 627 hiring hall several days after he talked to the Roger superintendent. He was referred to Defiance for employment. He paid his reinstatement fee but denies that he was required to do so as a condition of referral. He also signed a Local 627 authorization card.

The General Counsel and Charging Party contend that Respondent's illegal motivation is shown by certain statements made by its agents, some of which are established by the testimony of James Smith, former superintendent of Roger, in the prior unfair labor practice proceeding regarding statements made by Growitz and Respondent's

[17] An employee has been treated herein as part of the employee complement even though he did not appear on the payroll for a particular payroll period if he reappeared on the payroll in succeeding payroll period. Salaried employees were not counted.

[18] In practice only supplemental dues are checked off.

president, Frank Podpechan.[19] Specifically, Smith creditably testified that on May 12, 1978, Podpechan instructed him to inform the employees that Respondent would not negotiate with UMW but that if the employees wanted to form an independent union or join the Operating Engineers he would discuss it. Podpechan said if the employees voted to be represented by UMW, Respondent would be shut down and they would lose their jobs. He also said he was moving the trucking operation in order to rid Respondent of the troublemakers.

Smith further testified that around the end of May 1978, Podpechan discussed with him a mine plan whereby Respondent would reduce the number of employees at Roger Mine to 30, but would maintain the same level of production. Podpechan also said that, if Smith had not increased the employee complement, UMW would not have commenced its organizational campaign, that UMW wanted to organize Roger Mine because it was the second largest mine in the area. Podpechan further said he knew the identity of the troublemakers and wanted them laid off, that, by cutting the employee complement to 30 men, they could rid Respondent of the troublemakers and UMW would not bother about organizing such a small mine. Podpechan said he wanted the layoff implemented immediately. Smith said he thought the timing was bad, that the employees would think and know it was motivated by their union activities. Podpechan agreed to wait for a period of time after the election before implementing the layoff. Podpechan further said he had toyed with the idea of making each pit a separate mine so that each mine would have a limited number of employees, that the mines would be separately organized under different company names so as not to be a target for union organization.

Smith also testified that he met with Growitz, Peacher, and Barnes on May 11, 1978. During the course of this meeting, Growitz said the truckdrivers and two of the tipple operators were union organizers and troublemakers and that another corporation would be formed so they would not be employees of Respondent. They also discussed forming other companies that would own the coal leases and equipment and do the hauling and loading so that Respondent would own no assets.

UMW representative Harvey Haynes and employee Pete Triplett testified that in September 1978 they had a conversation with Growitz in the superintendent's office at Roger. At some point Gallo and Weinecke were present but then left. At a time when neither Weinecke nor Gallo was present Growitz told Haynes he had heard rumors that a strike would be called and asked if it were true. Haynes denied knowledge of any such plans. Growitz said if there was a strike, Respondent would close the Roger Mine and transfer the men and equipment to Porum. Growitz said that would be a hardship on the employees who lived in the vicinity of the Roger Mine. Growitz testified that he did have a conversation with Haynes and Triplett that day but he does not recall whether anything was said with regard to strike rumors. He does not recall saying that if the employees went on strike, production would be moved from Roger to Porum.

Hooley Thompson testified that during mid-June during a casual encounter with Podpechan away from Respondent's facilities, he inquired as to the progress of the mining and asked what Podpechan thought of the union deal. Podpechan replied, "Oh, I'll just keep it in court a couple of years and it will be throwed out, and people move away, and everybody will forget about it, and it will be over with." Thompson said he was not going anywhere.

2. Conclusions

The complaint alleges that Respondent has violated Section 8(a)(1), (3), and (5) of the Act by performing work at its Defiance Mine which had previously been performed by unit employees at the Roger Mine, without notification to or bargaining with UMW; and has violated Section 8(a)(1), (2), and (3) of the Act by granting recognition to Local 627 at the Defiance Mine and by giving effect to a collective-bargaining agreement with Local 627 as the exclusive collective-bargaining representative of employees at the Defiance Mine notwithstanding that at the time Respondent did not employ a representative segment of its ultimate employee complement there.

Respondent argues that the opening of a new facility is a decision lying at the core of entrepreneurial control within the meaning of the Supreme Court's decision in *Fibreboard*[20] and thus Respondent had no obligation to bargain as to this decision with UMW or any other union. Further, Respondent argues, there could be no refusal to bargain since UMW never requested bargaining about the Company's decision either to open the Defiance Mine or as to the possible effect of such opening on employees of the Roger Mine. Respondent also argue that the Defiance Mine was opened for sound business reasons—principally the acquisition in mid-1978 of the Payne-Kell reserves which had the most favorable strip ratio of any reserves of over 100,000 tons available to

[19] For reasons that are unclear, the General Counsel and Charging Party initially chose not to rely on the findings and conclusions of the Administrative Law Judge in the prior proceedings (248 NLRB 779) but rather introduced Smith's testimony under Rule 804(b)(1) of the Federal Rules of Evidence. Thereafter when Podpechan and Peacher testified in denial of Smith's assertion, Charging Party and General Counsel argued that they were estopped from doing so because the issue had been litigated in the prior proceeding.

In essence, Podpechan testified that he did not make the statements regarding what he would do to avoid unionization. He admits that he said he was against unionization because of the cost but contends he also said that it was up to the employees. He further testified that his conversation with Smith was essentially a discussion of a mine plan which dealt with projected staffing of the mine. He also admits that he expressed a belief that unions were not interested in small mines. I think the General Counsel and Charging Party are in no position to rely on the doctrine of estoppel since notwithstanding that the Administrative Law Judge in the prior proceeding credited Smith and that his findings were completely favorable to them, they chose to place the issue before me. However, the estoppel issue is not decisive since, in any event, I would not credit Podpechan's and Peacher's belated denials as to the making of such statements. They both testified in the prior proceeding. They did not deny Smith's testimony nor were they specifically questioned in that regard. Considering the obvious critical import of Smith's testimony as to illegal motivation, I cannot assume that this omission was merely inadvertence.

[20] *Fibreboard Paper Products Corporation* v. *N.L.R.B.*, 379 U.S. 203 (1964).

Respondent, coupled with the shutoff of Respondent's Fort Scott coal sources caused by the strike.

As to its recognition of Local 627, Respondent argues that in industries such as, but not limited to, construction, where there is regular movement of worksites, the considerations affecting union recognition are somewhat different than in manufacturing industries where the workplace and the work force typically remain more constant. In such industries, the argument continues, it is proper under the Act to have bargaining units which encompass present *and future* sites and, once majority status has been obtained, it is not necessary to demonstrate or even achieve majority status at each new worksite in order to retain such bargaining rights.

Respondent cites numerous cases, mostly involving the construction industry or the presumption of majority status as affected by high turnover rates and numerous jobsites, in support of this argument and quotes extensively therefrom. However, I find that Respondent's reliance on the cases involving presumption of majority status is misplaced in the circumstances herein. As to the construction industry cases, the construction industry enjoys a unique statutory status by virtue of Section 8(f) of the Act, which specifically provides that it shall not be a unfair labor practice for an employer engaged primarily in the building and construction industry to make an agreement with a labor organization of which building and construction employees are members covering employees engaged in said industry because the majority status of such labor organization has not been established prior to the making of such agreement.

Respondent seems to be arguing that strip mining is so similar to the building and construction industry that the same consideration as to establishment of majority should apply. I disagree. Whatever might be the efficacy of this argument in other circumstances, here respondent has not established an essential similarity between the two industries. Here, Respondent sought only to establish on the record that similar equipment and skills are required in strip mining and road construction. In its brief, it argues that the transitory nature of jobsites is similar. However, no attempt was made to establish any similarity between the two industries as to what was probably the most essential factor, relevant herein, leading to this special statutory consideration for the building and construction industry—the instable nature of the work force including the necessity of hiring most employees on a single project basis which would often effectively deprive building and construction employees of an opportunity for representation, if required to adhere strictly to the requirements of Section 9(a) of the Act. Here, I conclude that Respondent has not established that the nature of its operation is such that would tend to deprive its employees of an effective opportunity for representation unless some variation of the normal rule is fashioned.

It is well established that recognition of a union prior to the employment of a representative complement of employees, absent accretion, violates Section 8(a)(2) of the Act, regardless of the employer's good faith or the absence of a question concerning representation. *General Cinema Corporation*, 214 NLRB 1074 (1974). It is also well established that a new facility cannot be represented legally by a union simply because the union and the employer are parties to a collective-bargaining agreement covering a prior existing unit which contains a clause whereby the employer agrees to recognize the union at all its facilities in a particular geographic area including those acquired after the execution of the contract. These clauses can be read only to require recognition upon proof of majority status by the Union.[21] *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975).

Here, the record is clear that at the time Local 627 offered its initial proof of majority Respondent had employed only three employees at Defiance. Based on the notice posted at Porum as to positions to be filled at Defiance, a representative complement would be, minimally, seven which would presuppose a one-shift, 5- or 6-day operation. However, record evidence indicates that Respondent's normal mode of operation was a three-shift, 7-day operation. In such an operation, the representative complement would be, minimally, 13.

Furthermore, in hiring the initial three employees, Respondent implemented at Defiance the hiring hall provision of the Local 627 hiring Porum agreement and secured these three employees through the Local 627 hiring hall. Thus, by giving effect to this agreement, Respondent actually recognized Local 627 prior to the hiring of any employees. Accordingly, I find that by granting recognition, and giving effect to a collective-bargaining agreement covering wages, hours, and other conditions of employment with Local 627 as the exclusive collective-bargaining representative of employees at its Defiance Mine prior to the hiring of any employees at said mine, Respondent violated Section 8(a)(1) and (2) of the Act.

I further find that by giving effect to the union-security and hiring hall provisions of said collective-bargaining agreement, including referring employee applicants to Local 627's hiring hall prior to their employment at the Defiance Mine and refusing to employ any applicants at the Defiance Mine who had not been referred by Local 627, Respondent has violated Section 8(a)(1), (2), and (3) of the Act. *General Cinema Corporation, supra; The Wackenhut Corporation*, 226 NLRB 1085 (1976).

I also find that the General Counsel has failed to establish, as alleged in subparagraph 16(c) of the complaint, that Respondent required employee applicants to acquire membership in Local 627 prior to employment at the Defiance Mine.

As to the allegation that Respondent violated Section 8(a)(1), (3), and (5) when, without notification to or bargaining with UMW, it commenced performing work at the Defiance Mine which had previously been performed by unit employees at its Roger Mine, Respondent admits that upon the opening of the Defiance Mine, it commenced supplying coal for its Fort Scott coal contracts from Defiance Mine production which contracts had

[21] Apart from the status allegedly derived from the after-acquired clause, Respondent does not contend, nor does the record establish, that Defiance is an accretion to the Porum Mine. See *Melbet Jewelry Co., Inc., and I.D.S.-Orchard Park, Inc.*, 180 NLRB 107 (1969); *Rollins-Purle, Inc.*, 194 NLRB 709 (1971); *The Wackenhut Corporation*, 226 NLRB 1085 (1976); *Arco Electronics, Inc. and Precision Film Capacitors, Inc.*, 241 NLRB 256 (1979).

been previously filled with coal produced at Roger Mine. Respondent further admits that the date of the Defiance Mine opening was accelerated by the strike at the Roger Mine.

It is well established that the acceleration of a decision to transfer unit work in order to avoid recognition of, and/or bargaining with, the collective-bargaining representative of the unit employees is violative of Section 8(a)(3) of the Act even where the initial decision to effect the transfer is based on legitimate economic considerations. *Bridgeford Distributing Co.*, 229 NLRB 678 (1977). Charging Party argues that but for the strike and UMW's status as statutory representative, the Payne-Kell reserves would have been mined as part of the Roger Mine. I find that assertion to be speculative and unsupported by the record. However, as noted above, the acceleration of the commencement of the mining of the Porum-Kell reserves was admittedly motivated by the strike. Respondent argues that this was strictly an economic decision, that it had to fulfill its contracts for Fort Scott coal and the strike prohibited it from doing so from the production at Roger Mine. Consequently, it was an economic necessity for it to commence mining the Payne-Kell reserve and thus its conduct was not violative of the Act.

I find no merit in this asserted defense. Whatever the appeal of this argument might be if Respondent's conduct was untainted by its unfair labor practices, the fact is that the strike, which Respondent now offers as a defense, was caused and prolonged by Respondent's illegal conduct in discriminatorily laying off, and refusing to reinstate employees, engaging in surface bargaining with UMW and subcontracting certain of its operations because of its employees' union activity.[22]

Furthermore, hiring new employees through the Local 627 hiring hall in the face of outstanding applications for reinstatement from Roger strikers and according to Porum employees the opportunity to transfer to Defiance while at the same time refusing to accord Roger employees the same opportunity establishes unlawful discrimination against Roger employees and in favor of Porum employees and others represented by Local 627 based entirely upon the identity of their collective-bargaining representative. *Bridgeford Distributing Co., supra; Rushton & Mercier Woodworking Co., Inc.*, 208 NLRB 123 (1973); *Fraser & Johnston Company*, 189 NLRB 142 (1971). Specific proof of intent is unnecessary since Respondent's conduct inherently tends to discourage membership in UMW and is thus clearly inherently destructive of the Section 7 rights of its employees.[23] *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company]* v. *N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Ruston & Mercier Woodworking Co., supra; Bridgeford Distributing Co., supra.* Accordingly, I find that Respondent violated Section 8(a)(1) and (3) by accelerating the date of the opening of the Defiance Mine and the concomitant discrimination against Roger employees by refusing to accord them the opportunity to work at Defiance.

The complaint also alleges that this conduct violated Section 8(a)(5) of the Act. Respondent admits that it did not notify, or bargain with, UMW as to the opening of the Defiance Mine. However, it contends that UMW never requested bargaining, thus there could be no refusal to bargain. I find no merit in this argument. Although UMW did acquire actual knowledge of some type in November 1978 of the opening of a new mine and made no request to bargain prior to the opening of the mine, I find that such a request would have been futile.

When UMW finally requested bargaining several months thereafter, Respondent responded that it was committed by its contract with Local 627 to recognize Local 627 as the exclusive bargaining representative of its employees at Defiance. A further indication of the futility of a request to bargain is Respondent's prehire recognition of Local 627 based on said contract and its refusal to offer jobs at Defiance to the Roger strikers who had applied for reinstatement and to the laid-off Roger employees. In these circumstances a request to bargain is not a prerequisite to a finding of a refusal to bargain.

As set forth above, admittedly the commencement of mining at Defiance, with the concomitant supplying of Fort Scott coal from Defiance to customers who had previously been supplied with coal from the Holley-Fort Scott pit at Roger Mine, resulted in the failure, after the strike, to resume mining at the Holley-Fort Scott pit. This constituted an effective transfer of unit work. It is well settled that under the Act Respondent has an obligation to give prior notification to its employees' statutory representative and to afford it an opportunity to bargain with respect to such a transfer of unit work and its effect on unit employees. *Fiberboard Paper Products Corporation*, 138 NLRB 550 (1962), enfd. 379 U.S. 203 (1964); *Cooper Thermometer Company*, 160 NLRB 1902 (1966), enfd. in pertinent part 376 F.2d 684 (2d Cir. 1967); *Fraser & Johnston Company, supra; Helrose Bindery, Inc. and Graphics Arts Finishing, Inc.*, 204 NLRB 499 (1973). This Respondent failed to do. Accordingly, I find that Respondent thereby violated Section 8(a)(1) and (5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(1), (3), and (5) by its transfer of work from the

[22] *Carbonex Coal Company*, 248 NLRB 779 (1980).

[23] In view of this finding, it is unnecessary to reach the issue of specific antiunion motivation as asserted by General Counsel and Charging Party.

Roger Mine to the Defiance Mine without notification to, and bargaining with, UMW and that it also violated the Act by refusing to accord Roger employees the opportunity to work at Defiance, I must consider the General Counsel's and Respondent's contention that such conduct requires that Respondent be ordered to recognize UMW as the exclusive collective-bargaining representative of the employees in the appropriate unit at the Defiance Mine.

The Board has held that when an employer fails to bargain with the Union concerning the conditions for permitting the employees at the old location to transfer to the new, it is reasonable to infer that a majority of the employees would have transferred but for the employer's violation of Section 8(a)(5), and that the Union is entitled to retain its status as majority representative at the new location. *Fraser & Johnston Company, supra; Helrose Bindery, Inc.*, 204 NLRB 499 (1973); *Allied Mills, Inc.*, 218 NLRB 281 (1975). Here it is particularly likely that a sufficient number would have transferred. Thus, as noted above, a representative complement of employees at the initial point when it would have been appropriate to establish majority status was 13. Thereafter, the employee complement at Defiance was never more than 15 to 20.

Even though given an opportunity to transfer, only three Porum employees in fact transferred, something which can perhaps be explained by the fact that Porum is 80 or 90 miles from Defiance. On the other hand, the Roger Mine is only about 4 miles from the Defiance Mine. Also, at the time the Defiance Mine commenced operations in early January, there were outstanding applications for reinstatement dating from mid-November 1978 from 11 strikers. Within a week or 10 days after operations commenced at Defiance at a time when Respondent had hired only three to five employees at Defiance, an additional three employees applied for reinstatement. One of these strikers specifically sought employment at Defiance and was told he would have to be referred from the Local 627 hiring hall.

In addition, a number of Roger employees were on layoff, 13 of whom had specifically requested reinstatement in September and October 1978. Nine of them made more than one request and two specifically requested employment at Defiance with the same result as with the one striker mentioned above. In these circumstances, the probability is extremely high that a sufficient number of Roger employees, given the opportunity, would have transferred to Defiance to comprise a majority of the employee complement there. Furthermore, even though it is impossible to know with certitude that a sufficient number of Roger employees would have transferred, the uncertainty arises from Respondent's illegal conduct and thus must be resolved against Respondent.

Accordingly, I shall recommend that Respondent, upon request, bargain collectively with UMW concerning the effects upon the Roger employees of the transfer of work from Roger to Defiance, particularly with respect to the transfer of such employees. I shall also recommend that Respondent recognize and bargain collectively with UMW as the exclusive bargaining representative of the employees in the appropriate unit at the Defiance Mine unless the parties mutually agree to do otherwise.

Having found that Respondent discriminatorily hired at its Defiance Mine new employees through the Local 627 hiring hall and transferred Porum Mine new employees represented by Local 627 to Defiance without recalling Roger strikers who had made application to return to work and laid-off Roger employees because of the identity of their collective-bargaining representative, I shall recommend that, to the extent it has not already offered them jobs at Defiance, Respondent offer to as many of said Roger strikers and laid-off employees immediate reinstatement at, or transfer to, the Defiance Mine to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as are presently required at Defiance Mine discharging, if necessary, present Defiance Mine employees not in that group of strikers and laid-off employees.

Since I have also found that Respondent discriminatorily hired new employees at the Roger Mine rather than reinstating strikers, I shall recommend that, to the extent it has not already done so, it offer said striker-discriminatees reinstatement to their former or substantially equivalent positions at the Roger Mine without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired after the commencement of the strike. I shall further recommend that all employees entitled to reinstatement at either the Roger Mine or the Defiance Mine, as described above, for whom Respondent has no immediate position available at either the Roger Mine or the Defiance Mine be placed on a preferential hiring list for reemployment at either the Roger Mine or the Defiance Mine as positions for which they are qualified become available.

To the extent that positions are available at both the Roger Mine and the Defiance Mine at the time any employees are offered immediate reinstatement, said employees individually shall be given the option of choosing the mine at which they desire reinstatement. In the event any employees reinstated at the Roger Mine without the option of choosing the mine at which they desire reinstatement express a desire to transfer to the Defiance Mine such employees shall be placed on a Defiance Mine preferential hiring list and as positions become available at the Defiance Mine for which they are qualified, Respondent shall offer such position to them in the order of the priority to which they are entitled as determined in the compliance stage of this proceeding or by bargaining with UMW, before new employees are hired.

Since the record is insufficient in this regard, it shall be left to the compliance stage of this proceeding to determine (1) whether the offers of reinstatement to jobs at the Roger Mine made to strikers were valid; (2) which of said strikers and laid-off employees already have received valid offers of employment at Defiance; (3) which employees shall be offered immediate reinstatement to which mine and which of such employees shall be permitted the option of choosing the mine to which they desire reinstatement; and (4) which employees shall be placed on a preferential hiring list and their order of priority thereon.

As to backpay, Respondent shall be required to make whole each of said employees for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to the amount which each of them normally would have earned from the date of the discriminatory failure to recall them, to the date of Respondent's offer of reinstatement, less the net earnings of each during such period, with interest thereon to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[24]

Having found that Respondent violated Section 8(a)(1), (3), and (5) of the Act by unlawfully recognizing Local 627 as the exclusive collective-bargaining representative of its employees at the Defiance Mine, I shall recommend that Respondent withdraw such recognition from Local 627 both until it has complied with the bargaining order described above, and unless and until Local 627 has been certified by the Board as the exclusive bargaining representative of its production and maintenance employees at the Defiance Mine in the appropriate unit.

I shall also recommend that Respondent cease applying the provisions of the Local 627 Porum-Stigler-Defiance contract or any extension, renewal, or modification thereof insofar as it applies to employees at the Defiance Mine, provided, however, that nothing herein shall require Respondent to vary or abandon any wages, hours, or other substantive features of its relations with its employees at the Defiance Mine which Respondent has established in the performance of said contract or the preceding contract, or to prejudice the assertion by employees of any rights they may have thereunder.

Having found that Respondent unlawfully applied, and enforced, as to Defiance Mine employees, the union-security and checkoff provisions of said contract and the preceding Porum-Stigler Local 627 contract, I shall further recommend that Respondent be required to reimburse the present and former Defiance Mine employees for all initiation fees, reinstatement fees, dues, or other moneys paid or checked off pursuant to said unlawful union-security agreement with interest thereon to be computed as prescribed in *Florida Steel Corporation, supra*. Reimbursement, however, will not extend to any such employees who may have voluntarily joined and been active members (not on withdrawal) of Local 627 prior to their employment by Respondent at the Defiance Mine.

Upon the foregoing findings of fact and the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America and International Union of Operating Engineers, Local 627, AFL–CIO, each is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including truckdrivers, employed by Respondent at its Roger Mine and its Defiance Mine near Chelsea, Oklahoma, excluding all other employees, coal processing and loading employees, office clerical employees, guards and supervisors, as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to notify, and bargain with, the UMW as to its intentions to cease mining Fort Scott coal at the Roger Mine and to commence mining Fort Scott coal at a new mine, called the Defiance Mine; and as to the effect of such a transfer of unit work on the employees in the appropriate unit at the Roger Mine particularly their right to transfer to the Defiance Mine, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By unilaterally, without notification or consultation with the UMW, engaging in direct bargaining covering shift schedules with certain unit employees at its Roger Mine in derogation of the bargaining rights of UMW and subsequently implementing the change in shift schedule as agreed to with said employees, and by unilaterally, without notification to or bargaining with UMW, granting a wage increase to unit employees at the Roger Mine, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By discriminatorily hiring new employees at the Roger Mine at a time when there were outstanding applications for reinstatement from strikers, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By discriminatorily accelerating the date of the opening of the Defiance Mine and the concomitant transfer of work from Roger Mine to Defiance Mine and by discriminatorily transferring employees from its Porum Mine and hiring new employees through the Local 627 hiring hall without recalling strikers who had applied for reinstatement and laid-off unit employees, Respondent has violated Section 8(a)(3) and (1) of the Act.

8. By prematurely recognizing Local 627 as the exclusive bargaining representative of all production and maintenance employees at its Defiance Mine at a time when no employees had been hired; by unlawfully extending to said employees its contract with Local 627, containing union-security, checkoff, and hiring hall provisions, in effect at its Porum Mine; and by subsequently executing and maintaining a collective-bargaining agreement with Local 627 containing union-security, checkoff, and hiring hall provisions; by referring employee applicants to the Local 627 hiring hall prior to employing them at the Defiance Mine and refusing to employ any applicant at the Defiance Mine who had not been referred by Local 627, Respondent has violated Section 8(a)(3), (2), and (1) of the Act.

9. The record does not establish that Respondent has required employee applicants to acquire membership in Local 627 prior to employment at the Defiance Mine, as alleged in subparagraph 16(c) of the complaint.

Upon the foregoing finding of facts, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[24] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[25]

The Respondent, Carbonex Coal Company, Chelsea, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing International Union of Operating Engineers, Local 627, AFL-CIO, as the exclusive bargaining representative of any of its employees in the appropriate bargaining unit described below for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, both until it has complied with the provisions of this Order requiring it to bargain with the United Mine Workers of America and, thereafter, unless and until Local 627 shall have been certified by the Board as representative of any such employees.

(b) Giving any force or effect to the collective-bargaining agreement adopted and executed on about June 1, 1979, covering Respondent's employees at the Defiance Mine in the appropriate unit described below, or to any modification, extension, or renewal of such agreement, provided, however, that nothing herein shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with such employees under these agreements, or prejudice the assertion by these employees of any right that they may have thereunder.

(c) Encouraging membership in Local 627, or any other labor organization, or discouraging membership in United Mine Workers of America, or any other labor organization, by applying, maintaining, or enforcing an invalid collective-bargaining agreement containing union-security, checkoff, and hiring hall provisions, or by discriminating in any like or related manner in regard to the hire or tenure of employment or any other term or condition of employment.

(d) Refusing to bargain collectively with United Mine Workers of America concerning the transfer of employees, and other effects upon the employees, resulting from the transfer of unit work from the Roger Mine to the Defiance Mine and refusing to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with United Mine Workers of America as the exclusive representative of its employees in the following appropriate unit:

> All production and maintenance employees, including truckdrivers, employed by Respondent at its Roger Mine and its Defiance Mine, near Chelsea, Oklahoma, excluding all other employees, coal processing and loading employees, office clerical employees, guards and supervisors, as defined in the Act.

(e) Unilaterally changing the terms and conditions of the employment of its represented employees without bargaining with their exclusive collective-bargaining representative.

(f) Engaging in direct bargaining with its represented employees in derogation of the bargaining rights of their exclusive collective-bargaining representative.

(g) Discriminating with regard to employees' hire or tenure of employment or any other term and condition of employment, against its employees represented by United Mine Workers of America and in favor of employees represented, or referred by Local 627 based upon the identity of their collective-bargaining representative.

(h) Transferring work out of the above-described unit, or accelerating a decision to make such transfer, because of the union activities or sympathies of employees in said unit.

(i) Referring employee applicants to the Local 627 hiring hall prior to employing them at the Defiance Mine or refusing to employ any applicant at the Defiance Mine who has not been referred by Local 627.

(j) Hiring new employees into a bargaining unit at a time when there are outstanding applications for reinstatement from striking employees in said unit.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.[26]

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from International Union of Operating Engineers, Local 627, AFL-CIO, as the collective-bargaining representative of any of the employees in the appropriate unit described above, both until Respondent has complied with the provisions of this Order requiring it to bargain with the United Mine Workers of America, and, thereafter, unless and until the Board shall have certified Local 627 as such representative.

(b) Reimburse each of its present and former employees, excepting those employees who were active members of Local 627 prior to their employment at the Defiance Mine, for all initiation fees, reinstatement fees, dues, and other moneys paid or checked off pursuant to said unlawful union-security contract, with interest.

(c) Upon request, bargain collectively with United Mine Workers of America concerning the transfer of employees, and other effects upon the employees, resulting from the transfer of unit work from the Roger Mine to the Defiance Mine.

(d) Bargain in good faith with the United Mine Workers of America, as the exclusive representative of Defiance Mine employees as part of the above-described appropriate unit, and embody in a signed agreement any understanding reached.

(e) To the extent it has not already done so, offer to Roger Mine strikers and laid-off employees reinstatement at, or transfer to, the Defiance Mine to their former or

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[26] Respondent's prior unremedied unfair labor practice and the nature and extent of those found herein make a broad order appropriate.

substantially equivalent position, without prejudice to their seniority or other rights and privileges in such numbers as Defiance Mine now needs, discharging, if necessary, present Defiance Mine employees not in that group of strikers and laid-off employees.

(f) To the extent it has not already done so, offer to Roger strikers, who were discriminatorily denied reinstatement at Roger Mine, reinstatement to their former or substantially equivalent positions at the Roger Mine, without prejudice to their seniority or other rights and privileges discharging, if necessary, any replacement hired after the commencement of the strike.

(g) Place all Roger strikers and laid-off employees for whom Respondent has no immediate position available at either the Roger Mine or the Defiance Mine on a preferential hiring list for reinstatement at either the Roger Mine or the Defiance Mine and offer them immediate and full reinstatement on the same conditions as above as vacancies occur in the manner set forth in, section of this Decision entitled "The Remedy."

(h) Make whole each of the above-described strikers and laid-off employees for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

(i) Post at its Roger Mine and Defiance Mine near Chelsea, Oklahoma, copies of the attached notice marked "Appendix."[27] Copies of said notice, to be furnished by the Regional Director for Region 16 of the Board, shall be duly signed and posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(j) Mail copies of said notice to all Roger Mine employees on strike, including those who had made outstanding applications to return to work or layoff status at the time of the opening of the Defiance Mine who are not presently employed at the Roger Mine or the Defiance Mine.

(k) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."